

IN THE COURT OF APPEALS OF IOWA

No. 0-518 / 10-0166
Filed August 11, 2010

IN THE INTEREST OF C.J.F.M.,
Minor Child,

J.D.M., Father,
Petitioner,

C.L.B.-M., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

A mother appeals from the district court's ruling terminating the mother's parental rights on the basis of abandonment under Iowa Code chapter 600A (2009). **AFFIRMED.**

Jolie B. Juckette of Nelissen & Juckette, P.C., Des Moines, for appellant mother.

Alice E. Helle of Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C., Des Moines, for appellee father.

Craig Rogers, Waukee, for minor child.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

During John and Cheri's marriage, they had one child, Caden, who was born in 2002. John and Cheri were divorced on October 10, 2005, and the dissolution decree awarded them joint legal custody and joint physical care of Caden. In early 2006, Cheri pleaded guilty to several felonies and received a twenty-year suspended sentence with probation.

In September of 2006, Cheri received notification in the mail that there was a new criminal charge against her and that her probation officer requested the court to revoke her probation. Within twenty-four hours of receiving this news, Cheri made a decision "in complete panic" to move to Germany, where her current husband was stationed with the Army. Cheri remained in Germany until February 2008, and she was incarcerated in October 2008. Cheri has not seen Caden since the day before she moved to Germany

While Cheri was in Germany, she made attempts to contact Caden by writing him letters, sending him gifts, and calling the cell phone of his paternal grandmother, Shirley, who often took care of Caden while John and his current wife were at work. Cheri testified that while in Germany, she spoke to Caden multiple times per week and "called him constantly." She further testified that she called Caden "[s]ometimes every single day; sometimes every other day." She testified that her contact with Caden while she was in Germany was regular and routine.

John testified that Cheri called him at least ten times while she was in Germany to talk to Caden. He recognized that Cheri also contacted Caden when

he was in Shirley's care. Shirley testified that when Cheri first left for Germany, she called Caden "whenever it was convenient for her." She estimated that Cheri called roughly a couple times per month.

On April 11, 2007, while Cheri was in Germany, the district court granted John's application to modify John and Cheri's dissolution decree and awarded sole legal custody and physical care of Caden to John. The modification further required Cheri to pay child support in the amount of fifty dollars per month. Cheri was current on her child support obligation until shortly before her incarceration.

In February of 2008, Cheri returned from Germany. She did not attempt to see Caden when she returned. She testified that she knew she would be incarcerated soon because of her probation violation and she felt it was in Caden's best interests not to reenter his life and abruptly leave again. However, she testified she continued to speak to Caden on a regular basis.

Cheri began serving her sentence in October of 2008 and was still incarcerated at the time of trial. She testified that during her incarceration she wrote Caden every week. She further testified that she tried to call John roughly twelve times during her incarceration to contact Caden, but John refused to accept her phone calls. Shirley testified that Cheri wrote a letter asking that she take Caden to visit Cheri at the correctional facility. Shirley also testified that Cheri only started sending Caden weekly letters eight to ten weeks before trial, once she had notice of John's petition to terminate her parental rights. Shirley estimated that during the thirty-eight months between the date when Cheri left in September of 2006 to the time of trial, Cheri's attempts to contact Caden, whether by phone, letter, or gift, totaled thirty to forty times. She also testified

that there were periods of a couple months during which Cheri did not contact Caden.

On September 21, 2009, John filed a petition to terminate Cheri's parental rights, alleging she had abandoned the child. After a hearing on the matter, the district court found John established that Cheri had abandoned Caden and that it was in Caden's best interests to terminate Cheri's parental rights. Cheri appeals, arguing the district court erred in: (1) finding she abandoned Caden and (2) finding that termination of her parental rights is in Caden's best interests.

II. Standard of Review

Termination proceedings are reviewed de novo. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). We give weight to the district court's findings of fact, especially when considering credibility of witnesses, though we are not bound by them. *Id.* The primary interest in termination proceedings is the best interests of the child. *Id.*

III. Abandonment

Cheri argues that because she did not intend to abandon Caden, the district court erred in terminating her parental rights, citing *In re Goettsche*, 311 N.W.2d 104 (Iowa 1981). John argues, and we agree, that "intention to abandon" is no longer a statutory element in the definitions of Iowa Code chapter 600A. At the time *Goettsche* was decided, the Iowa Code stated, "To abandon a minor child' . . . includes both the intention to abandon and the acts by which the intention is evidenced." Iowa Code § 600A.2(16) (1979). However, the intention language has since been removed from this section and "[t]o abandon a minor child" is now defined as when

“a parent . . . rejects the duties imposed by the parent-child relationship . . . which may be evinced by the person, while being able to do so, making no provision or making only a marginal effort to provide for the support of the child or to communicate with the child.”

Iowa Code § 600A.2(19) (2009). Although we have referred to the element of intent since the statute was amended, we recognize that the legislature has redefined the proof requirements so that the parental mental state now is based on the parent’s conduct in rejecting parental duties rather than the intent to abandon.

Under current law, a parent is deemed to have abandoned a child six months of age or older

unless the parent maintains substantial and continuous or repeated contact with the child as demonstrated by contribution toward support of the child of a reasonable amount, according to the parent’s means, and as demonstrated by any of the following:

(1) Visiting the child at least monthly when physically and financially able to do so and when not prevented from doing so by the person having lawful custody of the child.

(2) Regular communication with the child or with the person having the care or custody of the child, when physically and financially unable to visit the child or when prevented from visiting the child by the person having lawful custody of the child.

(3) Openly living with the child for a period of six months within the one-year period immediately preceding the termination of parental rights hearing and during that period openly holding himself or herself out to be the parent of the child.

Iowa Code § 600A.8(3)(b).

Cheri has not seen Caden since September of 2006, when she fled to Germany to avoid arrest. She therefore has not demonstrated substantial and continuous or repeated contact under the first or third factors. Further, Cheri cannot show she was physically or financially unable to visit Caden, as is required under the second factor. We agree with the district court’s finding, “If

there was any financial or physical barrier for Cheri visiting Caden from September 2006 to February 2008, it was self-imposed as a result of Cheri's attempt to avoid arrest for violating her probation." Cheri does not argue that John prevented her from visiting Caden. Therefore, Cheri cannot meet the requirements of the second factor. John has shown by clear and convincing evidence that Cheri abandoned Caden within the meaning of Iowa Code section 600A.8(3).

IV. Best Interests of the Child

Once we affirm the district court's finding that a ground for termination under Iowa Code section 600A.8 has been established by clear and convincing evidence, we next consider whether termination is in the child's best interests. *R.K.B.*, 572 N.W.2d at 602. The best interests of the child "shall be the paramount consideration" while also "giving due consideration" to "the interests of the parents." Iowa Code § 600A.1.

The best interest of a child requires that each biological parent affirmatively assume the duties encompassed by the role of being a parent. In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, the fulfillment of financial obligations, demonstration of continued interest in the child, demonstration of a genuine effort to maintain communication with the child, and demonstration of the establishment and maintenance of a place of importance in the child's life.

Id.

Despite her argument to the contrary, the record demonstrates that Cheri failed to affirmatively assume the duties encompassed by the role of being a parent. Cheri voluntarily abandoned her son for nearly a year and a half while she fled to Germany to avoid arrest. Though Cheri made efforts to contact

Caden, those efforts were inadequate. In light of the fact that the only barriers between her and her son were self-imposed, Cheri's phone calls and letters to her son utterly failed to establish or maintain a place of importance in the child's life. Further, Cheri failed to visit her son in the roughly eight months between when she returned from Germany and when she was incarcerated. We agree with the district court's conclusion that Cheri's claim is disingenuous that she refrained from seeing Caden before she went to prison out of concern for the child; she did not worry about the effect on Caden when she requested that he be brought to the correctional facility to visit her after her incarceration.

Since Cheri's departure for Germany, Caden has been raised by John and his current wife, Shawntel. Caden's step-mother Shawntel wishes to adopt him, has been the maternal figure in his life, and is by all accounts a loving and consistent presence in his young life. The only evidence at trial regarding the time frame for Cheri's release and possible recommencement of a parenting relationship with Caden was provided in Cheri's testimony that she might be paroled in April of 2010. We agree with the district court that Caden should not have to wait any longer for permanency and stability. See *In re C.D.*, 509 N.W.2d 509, 513 (Iowa Ct. App. 1993) (noting the recognition by Iowa courts that the permanency and stability needs of the children must come first).

Cheri also asserts that termination of her parental rights would deprive Caden of the benefit of having a relationship with her children from a prior marriage, his half-siblings. However, the record establishes that John has maintained Caden's relationship with his older half-siblings.

As John proved abandonment by Cheri and the record reflects that termination is in the child's best interests, we affirm the district court's decision terminating Cheri's parental rights to Caden.

AFFIRMED.